THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Appeal from Greenville County Court of Common Pleas
The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2018-000480

Karriem Provet,.....Petitioner,

v.

State of South Carolina,.....Respondent.

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. WHETHER THE PCR COURT ERRED IN DENYING RELIEF IN FINDING TRIAL COUNSEL NOT INEFFECTIVE FOR FAILING TO INVESTIGATE THE LENGTH OF THE TRAFFIC STOP AND INCONSISTENCIES IN TIME BETWEEN THE VIDEO OF THE TRAFFIC STOP AND DISPATCH RADIO LOGS WHEN IT WOULD HAVE REVEALED AT THE SUPPRESSION HEARING THAT THE OFFICER UNREASONABLY AND MEASURABLY EXTENDED THE TRAFFIC STOP IN VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS.

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STATEMENT OF THE CASE

Petitioner was indicted by the Greenville County grand jury for trafficking cocaine 100 grams or more and resisting arrest. (2005-GS-23-3478, 2002-GS-23-4288). App. p. 2; pp. 142-144. Greenville County Assistant Solicitor John D. Newkirk prosecuted the case. William B. Long, Jr., Esquire[1] represented Petitioner. Prior to trial, Petitioner moved to suppress drug evidence from the traffic stop that formed the basis for the charges. App. pp. 159-160. Following a pretrial hearing on the motion, the Honorable Carmen T. Mullen denied the motion and trial proceeded on August 7th and 8th, 2007. App. p. 167-271. The jury found him guilty of both charges. App. pp. 470-71. Petitioner was sentenced to one (1) year imprisonment for resisting arrest and twenty-five (25) years imprisonment for trafficking cocaine, both sentences to run concurrent. App. p. 475, ln. 6-16; pp. 483-484.

Petitioner timely appealed. Tricia A. Blanchette, Esquire perfected the appeal. The Court of Appeals affirmed Petitioner's conviction and sentence on January 31, 2011. *State v. Provet*, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011). The Supreme Court of South Carolina granted certiorari and following oral argument in June 2013, this Court affirmed the decision of the Court of Appeals on August 14, 2013. *State v. Provet*, 405 S.C. 101, 747 S.E.2d 453 (2013). Remittitur was issued on August 30, 2013.

Petitioner filed a post-conviction relief application (PCR) raising numerous grounds on July 24, 2014. App. pp. 25-31. Respondent, represented by Senior Assistant Attorney General Karen C. Ratigan, filed a return to the application on January 8, 2015. App. pp. 34-37. An evidentiary hearing was held on June 26, 2017 before the Honorable Daniel Dewitt Hall. Undersigned counsel, William G. Yarborough III, represented Petitioner. Assistant Attorney

[1] Hereinafter referred to as Trial Counsel.

General DeShawn H. Mitchell represented Respondent. Petitioner and Trial Counsel were present for the hearing and testified. App. pp. 45-62; pp. 75-117. The PCR Court dismissed Petitioner's PCR on February 13, 2018. App. pp. 1-24. This appeal follows.

STATEMENT OF THE FACTS

Suppression Hearing Testimony

The charges arose from a traffic stop on May 1, 2002 on Interstate 85 in Greenville County. App. p. 188, ln. 7-18. Petitioner was pulled over by Corporal John Owens for following another driver too closely, specifically less then two car lengths, as well as driving with a burned out tag light. App. p. 188, ln. 7-25. Petitioner was driving alone in a 1997 Ford Expedition that day. App. p. 188, ln. 14-17, 21-22.

Owens approached the passenger side of Petitioner's vehicle and informed him of the reason for the stop and asked for his drivers license and registration. App. p. 189, ln. 7; p. 190, ln. 1-5. After Petitioner complied with the request, Owens directed him to exit the car and walk to the rear of the vehicle. App. p. 190, ln. 6; p. 191, ln. 15-20. The vehicle was registered to a person other than Petitioner, which Owens referred to as a "third-party vehicle"— a common practice in drug trafficking or drug transportation due to the lack of connection between the driver and the owner of the vehicle App. p. 190, ln. 7-8, 15-22. Owens also stated that he saw Petitioner heavily breathing and his hands shake during the stop, an indication to him that Petitioner was nervous. App. p. 191, ln. 1-3. Owens further explained that although a majority of the drivers he has pulled over do not appear as nervous as Petitioner; normally some drivers appear nervous and have accelerated breathing. App. p. 191, ln. 6-9. Although Owens did not indicate that he believed Petitioner had a weapon in his possession or that Petitioner may endanger his safety in anyway, Owens asked Petitioner if he could pat him down for weapons and Petitioner allowed him to do so. App. p. 192, ln. 1-16. Owens found no weapons or other contraband on Petitioner's person. App. p. 192, ln. 14-19. Owens sometime thereafter escorted

Petitioner to the passenger side of the patrol car where he began writing out the warning citation. App. p. 192, ln. 18-20.

With Owens and Petitioner now standing inside the space of the open passenger door of the patrol car, Owens prompted questions to Petitioner about various topics, both related and unrelated to the traffic stop. App. p. 193. Petitioner stated he had no weapons, alcohol, or drugs in the vehicle. App. p. 195, ln. 3-15. When Owens had asked about where he had been coming from, Petitioner stated he had been visiting his girlfriend whom lived in the Greenville area and that he had stayed at a Holiday Inn while visiting her. App. p. 193, ln. 3-4, 1-10. Owens opined that this response was odd to him because the point on the interstate at which he had observed the traffic infractions had been prior to the exit leading to a nearby Holiday Inn in Greenville. App. p. 193, ln. 1-13. Owens did admit he did not know which Holiday Inn Petitioner stayed at in the area and Petitioner, whom is not from the area, was unsure which of the Holiday Inns he had stayed. App. p. 193, ln. 13-24. Owens testified that he nonetheless believed that Petitioner "was giving [him] clues that he was deceptive in his answer or wasn't being completely truthful", but added still that Petitioner may not have known exactly where in the Greenville area he had been. App. p. 193, ln. 18-24. Owens also pointed to Petitioner's statement that he had no luggage in the trunk, but because Owens appears to have read from the incident report or other notes during the suppression hearing, a typo relates Petitioner as stating he had no luggage in the truck, which was odd to Owens due to Petitioner's two day visit. App. p. 194, ln. 20-25. Owens explained that he subsequently saw Petitioner did have a duffel or travel bag in the backseat. App. p. 195, ln. 1-2. Further, Petitioner had told Owens that their visit had been a "spur of the moment thing". App. p. 195, ln. 4.

According to Owens, Petitioner also explained that the vehicle was registered to a girlfriend other than the woman he had been visiting. App. p. 193, ln. 25 – p. 194, ln. 1-2. Owens testified that in response to his other questions, Petitioner stated he had never been in trouble with the law and had recently graduated from a technical skills program but was not then employed. App. p. 194, ln. 1-4. Owens explained that he would increasingly narrow his questions as the stop continued "[d]epending on how broad his answer was to my question." App. p. 195, ln. 10-21. However, Owens added that "[i]t was not an interrogation or anything like that. It was not something he had to - -". App. p. 195, ln. 21-23. Owens did not recall whether he asked the same question multiple times or in multiple forms. App. p. 225, ln. 2-8.

After questioning Petitioner, Owens "called for Trooper Aman to start heading to the location", and although Owens said he had been been in the process of the writing the ticket throughout this time, Owens did not call in to dispatch for a check on Petitioner's drivers license or the vehicle registration until then. App. p. 197, ln. 1-4. Thus, Owens and Petitioner began waiting for the license and registration check and for Aman to arrive from there on. App. p. 197, ln. 1-5. Owens testified, "You are doing a lot of other functions while you are writing a warning citation. Not only talking to the Defendant, but you are also running drivers license checks. All that other information. There are all kinds of things going on at the one time. You're also listening to the radio for any other officers..." App. p. 212, ln. 11-13. Owens stated that the time needed to write a warning ticket "depends on what is involved in writing the citation". App. p. 212, ln. 2-3. Owens conceded that many of his questions to Petitioner before calling for a check on the documentation were not related to the traffic stop but stated: "I think any time a law enforcement officer since 9/11, I think it is our duty, it is our obligation not only to just look at the traffic stop in general but look at the totality of the circumstances involved to make sure that

there is no other criminal activity involved as well." App. p. 214, ln. 24-25 – p. 215, ln. 1-4. Owens felt he wrote the warning ticket as expeditiously as possible and did not delay the process. App. p. 225, ln. 1-17.

During the time Owens and Petitioner waited for Aman to arrive with the dog and for the license and registration check to come back, Owens decided to return to the Ford Expedition[2] to confirm that the VIN number matched that on the registration and confirm that the VIN number on the door matched the number printed on the windshield's sticker. App. p. 197, ln. 5-11. Owens did not provide any specific reason to believe the vehicle may have been stolen besides that it was registered to a person other than Petitioner. As Owens checked the VIN number, he noticed the following items inside the vehicle: fast food bags, several receipts, air freshener, and one (1) cellphone in the center console, which he had not noticed on his "initial approach of the vehicle" immediately after he pulled Petitioner over. App. p. 198, ln. 1-16. Owens concluded that there was criminal activity afoot upon seeing these items on this "second approach of the vehicle." App. p. 198, ln. 18-22. Owens admitted that the one single cellphone did not trigger his suspicion. App. p. 217, ln. 12-16. Owens later testified he did not take the food bags, the air fresheners, or luggage bag into evidence. App. p. 217, ln. 5-18.

Owens testified that after his second approach, he returned to where Petitioner was standing, and waited for the check on the documentation to come through. App. p. 201, ln. 1-8. Aman had been arriving to the scene at this time. App. p. 201, ln. 4-5. Once receiving confirmation from dispatch, Owens thereafter gave Petitioner the warning citation and his belongings back. App. p. 201, ln. 1-8. Owens then explained the warning citation to Petitioner, which Petitioner stated he understood. App. p. 201, ln. 10-11.

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[2] Owens referred to returning to the Ford Expedition as his "second approach" of the vehicle. App. p. 198, ln. 3-4.

Owens then "asked him point-blank 'can I search your vehicle?'" with Aman[3] standing at his side and within an arms length of Petitioner. App. p. 201, ln. 12-16; ln. 21-24; p. 218, ln. 9-13; p. 221, ln. 19-21, p. 227, ln. 13-17. Petitioner replied by asking: "Do you want to search my vehicle?". App. p. 201, ln. 12-16; ln. 21-24. Owens did not see Petitioner's hands shaking when he asked for consent to search like he stated he saw at the beginning of the stop. App. p. 216, ln. 16 – p. 217, ln. 4. According to Owens, Petitioner ultimately gave consent to search.[4] App. p. 201, ln. 16-20. Owens agreed with Trial Counsel on cross-examination that he asked for consent to search the vehicle immediately after returning Petitioner's license and registration, describing the sequence as returning the documents then— "slam, bam" —asking for consent to search immediately thereafter. App. p. 216, ln. 4-12.

Owens acknowledged that the traffic stop was not complete until he releases Petitioner. App. p. 215, ln. 14-18. Owens did not inform Petitioner at any time that he was free to leave, including when returning his driver's license and registration. App. p. 216, ln. 1-4; p. 224, ln. 25 – p. 225, ln. 1. Likewise, Aman did not tell Petitioner he was free to go or that he could refuse consent. App. p. 236, ln. 16-25. Further, Owens repeatedly testified that when asking for consent to search, Petitioner was not free to go and Owens would not have let him leave if he had tried; but "[h]e should have felt free to go. He had all his items back." App. p. 221, ln. 24-25; p. 222, ln. 1-11, p. 225, ln. 18-21. If Owens had only seen Petitioner's hands shaking, quickened breathing, and third party registration before issuing the warning citation it was "questionable" whether Owens would have let him go. App. p. 223, ln. 3-25, p. 224, ln. 1-9.

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[3]Aman joined Petitioner and Owens where they were standing but the drug dog remained inside the vehicle at this point. App. p. 201, ln. 21-24. Aman testified that the stop lasted a few minutes after he arrived. App. p. 230, ln. 7-11.

[4] At the suppression hearing, Trial Counsel argued Petitioner's response was incoherent. App. p. 247, ln. 13-25. Petitioner has always denied giving consent to search. App. 89, ln. 2-10.

Owens stated he then instructed Aman to run the drug dog around the vehicle "even though I had consent. The canine is just another tool to use and maybe even expedite the situation." App. p. 203, ln. 3-6. Owens testified that Petitioner then ran across the highway and over the barrier to the fence line before he was ultimately apprehended and arrested. App. p. 204, ln. 6-13. Following a positive alert from the dog, the numerous officers then on the scene searched the vehicle and found cocaine in a plastic bag. App. p. 205, ln. 1-17; App. p. 229, ln. 18-25. The video from the traffic stop was admitted into evidence during the suppression hearing and at trial. App. p. 206, ln. 6 – p. 207, ln. 10; p. 310.

The video shows that the traffic stop lasted approximately ten (10) minutes before the warning ticket was issued. App. p. 244, ln. 15-24; *see* Traffic Stop Video. Trial counsel characterized the stop as "a normal period of time" when arguing that the drug evidence should be suppressed. App. p. 248, ln. 17-18. Solicitor Newkirk argued that the stop was not unreasonably long and the officers "did not elongate the initial traffic stop in an unreasonable amount", relying on *State v. Jones* in support. App. p. 249, ln. 22-25, p. 250, ln. 1-16; p. 254, ln. 20-23. Solicitor Newkirk acknowledged it was not a consensual encounter. App. p. 251, ln. 9-10. In ruling on Petitioner's suppression motion, the trial judge found the 10-minute length of the traffic stop reasonable and that the State had met its burden to prove Petitioner's consent to search was voluntarily given. App. p. 263, ln. 4-7.

PCR Hearing Testimony

At the PCR hearing, PCR Counsel entered into evidence the South Carolina Highway Patrol's dispatch radio logs from the traffic stop which reveal that the stop was over an hour in length rather than ten (10) minutes as purported at trial and depicted in the video. Respondent did not question or object to the authenticity of the dispatch records. App. p. 43, ln. 17-22. The codes

used throughout the call log correspond to identifiable codes used between dispatch and law enforcement. App. p. 73, ln. 13-25. A page deciphering the codes was available to the PCR court as well. App. p. 75, ln. 1-4. Further, the trial transcript contains Owens's translation of the codes he used when calling into dispatch, which are the same listed codes in the radio logs and heard on the video. App. p. 320, ln. 22 – p. 321, ln. 1-7. Specifically, Owens testified at the suppression hearing that code "10-27" stands for a drivers license check, code "10-28" stands for a vehicle registration check, and code "10-29" stands for an outstanding arrest warrant check. App. p. 320, ln. 22 – p. 321, ln. 1-7. During the hearing, Petitioner identified his North Carolina driver's license number 22226836 in the records, which is also listed on his arrest warrant. App. p. 141.

According to the video, he was pulled over at 2102 or 9:02 p.m.. Video; App. p. 91, ln. 12. The video shows Petitioner got out of the vehicle at Owens's request at 21:03 or 9:03 p.m. Video; p. 244, ln. 17-18. According to the video and trial testimony, his license and registration were called into dispatch at 21:08 or 9:08p.m. App. p. 97 ln. 23-25, p. 98, ln. 1. However, according to Owens's very own trial testimony deciphering the meaning of the codes, Owens did not call into dispatch for the licensed check and drivers license check until 2212 or 10:12 pm from the radio logs. App. p. 155, 8th row down. App. p. 155; p. 97 ln. 23-25, p. 98, ln. 1-2. Code 10-27 is also used at 2216 or 10:16. App. p. 155, 12th row down. Thus contrary to the video and Owens's testimony as to the length of the stop and time of each event, approximately one (1) hour and ten (10) minutes passed between Petitioner being pulled over and from when Owens radioed to dispatch to check Petitioner's license, registration, and for any active arrest warrants.

Trial Counsel testified at the PCR hearing that suppression was the pivotal issue in the case with the length of the stop being a major factor. App. p. 46, ln. 3-4; p. 48, ln. 4-5. Trial counsel stated he did not view the video of the traffic stop until just prior to the suppression

hearing. App. p. 46, ln. 16-19. Consequently, Petitioner did not view the video until just prior to the hearing as well. App. p. 66, ln. 24 – p. 47, ln. 1-3. Trial Counsel did not recall there being over an hour-long lag in the video's recording time. App. p. 49, ln. 14-25. Trial Counsel stated he did not think to review or use as evidence the dispatch radio logs showing this time lag but admitted they would have impacted the ruling on the suppression issue. App. p. 49, ln. 14 – p. 50, ln. 1-4; p. 53, ln. 4-8. Trial counsel stated he thought the length of the traffic stop, approximately ten (10) minutes long, was already long, but explained a traffic stop lasting an hour or more would have certainly strengthened the case. App. p. 52 – p. 53, ln. 1-2. Trial Counsel recalled that when viewing the video with Petitioner before the suppression hearing, Petitioner informed him that the entire traffic stop lasted far longer than what was depicted in the video. App. p. 55, ln. 12-16. Petitioner addressed this point to Trial Counsel in their previous meetings as well. App. p. 60, ln. 2-24.

Private investigator, Peter Skidmore has over 25 years of experience in this particular field of evidence-gathering and investigation, and was retained to investigate the video recording of the stop. App. p. 63, ln. 11 – p. 64, ln. 11-12. Skidmore had never worked as a highway patrolman but testified he was familiar with their recordkeeping from his experience working on past cases involving the department's records. App. p. 68, ln. 11-13. Skidmore obtained and reviewed a copy of the video and the radio logs and testified that two were not consistent as to the timing and length of the officers' actions according to trial testimony as well as the total length of the stop. App. p. 64, ln. 15-16, p. 65, ln. 6-9. Skidmore was only able to obtain a copy of the video. App. p. 65, 10-16. Skidmore had worked with an expert in California with the training and expertise necessary to determine whether the tape had been tampered with, but was unable to do so because the original tape had long been destroyed. App. p. 64, ln. 20-25 – p. 65,

ln. 1. Skidmore stated there is no apparent reason to explain the time discrepancy. App. p. 67, ln. 17-21

Petitioner testified he had asked Trial Counsel to review the video before trial and even filed a motion *pro se* requesting some action by the court or the clerk's office to allow him to watch it. App. p. 84 – p. 85, ln. 1-15. Before Skidmore had received a complete copy of the radio logs, Petitioner testified he had first requested a copy in 2006 while detained pending trial but had not received any reply and only obtained a copy, albeit incomplete, after he requested Appellate Counsel to request them for him. App. p. 76, ln. 10-15; p. 113, ln. 12-21. Petitioner stated he had given the records to Appellate Counsel but was informed they were unusable for his appeal because they were not introduced into evidence during the suppression hearing or thereafter at trial. App. p. 90, ln. 21-24; p. 78, ln. 23-25 – p. 79, ln. 1-2. Petitioner testified he became motivated to seek out these records after trial because the length of the traffic stop was far longer than depicted at the suppression hearing and at trial. App. p. 79, ln. 10-22. Petitioner had told Trial Counsel this in their various meetings before trial and thereafter, including during the hearing itself. App. p. 85, ln. 16-25 – p. 86, ln. 1-18; p. 99, ln. 18-24; p. 112, ln. 2-16; p. 121, ln. 2-7. During the suppression hearing, he had whispered to Trial Counsel that the testimony about the timing of the dog's arrival could not have been true. App. p. 112, ln. 20-24. Petitioner surmised that Trial Counsel did not believe Petitioner's claims to explain why Trial Counsel had not tried to investigate the length of the traffic stop. App. 112, ln. 9-10. Petitioner also knew of no explanation for the inconsistency. Petitioner also testified that he and Trial Counsel had never seriously discussed Petitioner testifying, and although Petitioner had thought he might want to at the time, Trial Counsel advised, "[I]t was the State's burden, so let the video be the evidence." App. p. 113, ln. 10-11.

Petitioner's wife, Shontea Smith, testified that prior to trial, she had gotten the video from Trial Counsel with Petitioner's consent and on his behalf. App. p. 120, ln. 7-25. She watched the video before either Trial Counsel or Petitioner and had transcribed the events and the timing of each event according to the video's time stamp. App. p. 120, ln. 19-25 – p. 121, ln. 1; p. 122, ln. 2-7. She gave the transcription to Petitioner who put Trial Counsel on further notice that the video depicts the stop being approximately an hour shorter in length than what had occurred. App. p. 120-121. Smith also related the same to Trial Counsel because he still had not investigated this further as trial grew closer.

At the conclusion of the PCR hearing, PCR Counsel argued that Trial Counsel was deficient for failing to further investigate the length of the stop after being put on notice numerous times and well before trial[5] that the video the State would play was inconsistent with what had actually occurred by over an hour. App. p. 128, ln. 15-25 – p. 131. PCR Counsel argued that had Trial Counsel presented the evidence that the length of the stop was over an hour, and was thus unreasonably and measurably extended by Owens, there is a reasonable probability that the suppression motion would have been granted. App. p. 128, ln. 15-25 – p. 131; p. 135, ln. 2-8. Respondent countered by arguing that Petitioner had not met the deficiency or prejudice prong to prove ineffective assistance of counsel and was thus not entitled to post-conviction relief. App. p. 132.

The PCR Court denied relief. App. pp. 1-24. The PCR Court did not question the authenticity of the radio log. Rather, the PCR Court reasoned Petitioner was not entitled to relief on this ground because Petitioner and Skidmore were not able to interpret the radio logs because

[5] Recall that Petitioner testified that he had subpoenaed the records in 2006 when Trial Counsel still had not yet viewed the video or acted on Petitioner's repeated claims the video time setting was wrong. App. p. 76, ln. 10-15; p. 113, ln. 12-21; p. 55, ln. 12-16; p. 85, ln. 16-25 – p. 86, ln. 1-18; p. 99, ln. 18-24; p. 112, ln. 2-16; p. 121, ln. 2-7. Petitioner was tried in August 2007.

they were not their author and had not worked for the Department of Public Safety. App. pp. 19-20. At the PCR hearing, Petitioner had identified the vehicle he drove and his drivers license number in the radio logs, and the PCR Court had Owens's trial testimony deciphering the meaning of the codes in the logs, as well as a guide to the codes used.

STANDARD OF REVIEW

The applicant has the burden of proving the allegations in his PCR application. *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). "A PCR judge's findings will not be upheld if such findings are not supported by probative evidence." *Gallman v. State*, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (citations omitted). The Court will also defer to the PCR court's findings on matters of credibility. *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). In contrast, questions of law are reviewed de novo. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

ARGUMENT

I. THE PCR COURT ERRED IN FINDING TRIAL COUNSEL NOT INEFFECTIVE FOR FAILING TO INVESTIGATE THE LENGTH OF THE TRAFFIC STOP AND INCONSISTENCIES IN TIME BETWEEN THE VIDEO OF THE TRAFFIC STOP AND DISPATCH RADIO LOGS, WHICH WOULD HAVE REVEALED AT THE SUPPRESSION HEARING THAT THE OFFICER UNREASONABLY AND MEASURABLY EXTENDED THE TRAFFIC STOP IN VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS.

A criminal defendant has the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI; S.C. Const. art. I § 14. Relief is warranted for its violation when counsel's performance was deficient and the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1985). Counsel is deficient when his performance falls below an objective standard of reasonableness according to prevailing professional norms. *Id.* at 688, 104 S.Ct. at 2065; *see also Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) ("Regarding the deficiency prong, the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases.") (quoting *McHam v. State*, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013)). The prejudice prong is satisfied when there is a reasonable probability that but for counsel's errors, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *see also Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.") (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). "When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have

been excluded." *Sikes v. State*, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574 (1986)).

Here, Trial Counsel's failure to investigate the actual length of the traffic stop and the discrepancies in time depicted in the video, and subpoena the radio logs demonstrating that discrepancy was deficient and prejudicial, in violation of Petitioner's right to the effective assistance of counsel guaranteed by the Sixth Amendment of the U.S. Constitution and Article I, Section 14 of the South Carolina State Constitution. U.S. Const. amend. VI ; S.C. Const. art. I § 14.

First, Trial Counsel's error was deficient because Petitioner had put him on notice several times that he remembered the stop lasting around an hour in length during their meetings prior to the suppression hearing and told Trial Counsel same upon viewing the video and even during the suppression hearing. App. p. 85, ln. 16-25 – p. 86, ln. 1-18; p. 112, ln. 2-16,17-24. *See Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 (noting counsel's conversations with the defendant may be critical when assessing counsel's investigation decisions).

It is a well-settled principle that "criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an *independent* investigation of the facts and circumstances of the case." *Edwards v. State*, 392 S.C. 449, 710 S.E.2d 60 (2011) (italics added) (citing *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008)). "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight*, at 46, 661 S.E.2d at 360 (citations omitted). In short, trial counsel has a duty to either conduct a reasonable investigation or make a

reasonable decision that makes investigation unnecessary. *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). In this case, Trial Counsel failed to do either. Trial Counsel had ample time and opportunity prior to trial to view the video of the traffic stop himself and gather the dispatch radio logs, in which he would have discovered the severe time discrepancy. Trial Counsel gave no reason as to why he did not follow up in any manner on Petitioner's assertions that the traffic stop lasted a long period of time. Trial Counsel cannot make a reasonable decision that renders further investigation unnecessary in this case when he did not view the video until just prior to the suppression hearing and thus forego pursuit of any independent investigation. *See McKnight*, at 45, 661 S.E.2d at 360 ("[S]trategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'") (quoting *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)). *See also Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (affirming PCR's order granting relief for counsel's failure to conduct adequate investigation in that it was undisputed that the prosecuting witness/victim did not want her son (PCR applicant) prosecuted on charges of forgery at the time of the guilty plea, which counsel could easily have investigated and discovered this fact and taken appropriate actions). Rather, Trial Counsel let the video speak for itself and accepted the time frame as stated at trial and depicted in the video. App. p. 244, ln. 14-25 Recall that Trial Counsel had advised Petitioner: "[I]t was the State's burden, so let the video be the evidence." App. p. 113, ln. 10-11. *See Bagwell v. State*, 410 S.C. 259, 255-66, 763 S.E.2d 630, 633-35 (Ct. App. 2014) (stressing trial counsel's duty to conduct an independent investigation rather than relying upon the results of the State's investigation).

In regard to the second *Strickland* prong, Trial Counsel's failure to investigate and use the radio logs at the suppression hearing was prejudicial because there is a reasonable probability

that if not for this error, the trial court would have suppressed the evidence. In this case, the prejudice prong of the *Strickland* analysis involves consideration of the impact of the over one (1) hour delay in completion of the traffic stop on the stop's reasonableness pursuant to Fourth Amendment case law. The approach taken by the courts to address Petitioner's case is instructive.

The trial court, the Court of Appeals, and the Supreme Court were presented with a record that operates on the premise that the traffic stop lasted approximately only ten (10) minutes before Petitioner's flight, with but few of those minutes allotted for Owens's questioning and waiting for the drug dog. The duration of the stop and the timing of the events proved to be significant to each of the courts to address the reasonableness of the stop and whether it was impermissibly extended. In its ruling, the trial court noted: "We know by the video in looking at the time and as stated [ ] by Mr. Long [] the traffic stop lasted about 10 minutes approximately. That was reasonable. I can tell you that was reasonable in my opinion for the traffic stop." App. p. 263, ln. 2-7. The trial court then shifted gears to whether something else generated reasonable suspicion to justify extending the stop further. App. p. 263, ln. 8 – p. 264, ln. 1. The trial court found justification in Owens's observations of items on his second approach of the vehicle, and differentiated the circumstances in Petitioner's case from *State v. Williams*. App. p. 264, ln. 2 – p. 267, ln. 1-10.

The Court of Appeals and this Court found no reversible error in the trial court's ruling or reasoning. *See Provet*, 391 S.C. at 499-500, 706 S.E.2d at 515 ("[T]he Fourth Amendment does not per se prohibit questions unrelated to the purpose of the traffic stop unless [they] unreasonably extend the traffic stop's duration...Owens did not unreasonably extend the traffic stop, because the traffic amounted to less than eleven minutes....Owens's series of questions and

observations occurred prior to the conclusion of the traffic stop."); *see also. Provet*, 405 S.C. at 110-111; 114-115, 747 S.E.2d at 457-458, 460 (holding "ten minutes was a reasonable length of time for the initial traffic stop and that Officer's off-topic questions did not measurably extend the duration of the stop" and also found that Petitioner's consent voluntarily given during a lawful seizure).

In light of the reasoning employed aforementioned, it is patent that the total length of the stop and the duration of Owens's questioning were pivotal to the outcome of the suppression issue. Because the radio logs reveal that the total length of the stop and duration of Owen's questioning were in actuality closer to one (1) hour in length rather than ten (10) minutes as previously thought, relief is warranted. Because Petitioner was pulled over at 9:02 p.m. and Owens did not call in to dispatch for a license and registration check until 10:12 p.m., Owens's questions on numerous and unrelated topics to Petitioner during all that time constitute as dilatory tactics that unreasonably and measurably extended the stop. According to Owens's testimony, he did not notice the fast food bags, air fresheners, receipts, cellphone, or the mistaken lack of luggage until his "second approach" of the vehicle.[6] App. p. 198, ln. 1-16. Owens made his second approach of the vehicle to check the VIN number *after* calling into dispatch for the license and registration check. App. p. 196, ln. 22-25 – p. 198. Owens's questioning clearly unreasonably and measurably extended the stop. "The Fourth Amendment permits an officer to conduct an investigation unrelated to the reasons for the traffic stop as long as it '[does] not lengthen the roadside detention.'" *United States v. Bowman*, 884 F.3d 200, 210 (2018) (quoting *Rodriguez v. United States*, — U.S. —, 135 S.Ct. 1609 (2015)). "For instance, police during the course of a traffic stop may question a vehicle's occupants unrelated to the

[6] Owens concluded that there was criminal activity afoot upon seeing these items on this "second approach of the vehicle." App. p. 198, ln. 18-22.

traffic infraction, or perform a dog sniff around [] the vehicle as long as the police do not "extend an otherwise-completed traffic stop in order to conduct these unrelated investigations." *Id.* (citing *Arizona v. Johnson*, 555 U.S. 323, 333, 129 S.Ct. 781 (2009); *Illinois v. Cabellas*, 543 U.S. 405, 409, 235 S.Ct. 834 (2005); *United States v. Williams*, 808 F.3d 238, 245 (4th Cir. 2015)). *See generally Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (explaining that in the *Terry* stop context, when police detain someone, "the officer may ask the detainee a *moderate* number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.") (italics added). However, a traffic stop becomes unlawful when it is prolonged beyond the point when "tasks tied to the traffic infraction are—or reasonably should have been—completed" even if only for a de minimis period of time." *Rodriguez*, 135 S.Ct. at 1614.

Owens's actions comprise the very type of dilatory tactics prohibited by the Fourth Amendment. "The officer may not extend the duration of a traffic stop in order to question the motorist on unrelated matters unless he possesses reasonable suspicion that warrants an additional seizure of the motorist. The officer cannot avoid this rule by employing dilatory tactics." *Provet*, 405 S.C. at 108, 747 S.E.2d at 457 (internal citations omitted) (citations omitted). "'[I]t is appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.'" *State v. Rodriquez*, 323 S.C. 484, 494, 476 S.E.2d 161, 166 (Ct. App. 1996) (quoting citation omitted). "[A]n officer need not employ 'the least intrusive means conceivable' in executing a stop, but he still must be reasonably diligent and must use 'the lease intrusive means reasonably available.'" *United States v. Hill*, 852 F.3d 377 (2017) (citations omitted). "[D]iligence is not present where the police officer 'definitely abandoned the

prosecution of the traffic stop and embarked on another sustained course of investigation' or where the unrelated questions 'constituted the bulk of the interaction between the police officer and the defendant.'" *United States v. Digiovanni*, 650 F.3d 498, 508-09 (4th Cir. 2011) (quoting authority citations omitted). In *State v. Rodriquez*, the Court of Appeals reversed the denial of the defendant's motion to suppress because the police did not act diligently investigating a drug trafficking tip after stopping he and another individual on foot after they exited a train. 323 S.C. at 493-494, 476 S.E.2d at 166-167. The Court of Appeals reasoned that "[e]ven assuming an investigative detention was proper at that point, we find a thirty minute detention while the officers attempted to elicit incriminating evidence from Rodriquez is the type of fishing expedition denounced by our Supreme Court in *Sikes.*" *Id.* at 493-494, 476 S.E.2d at 166-167 (noting the officers had not arranged to have a drug dog unit at the train station even after they learned the defendant's train was running late). *See also State v. Woodruff*, 344 S.C. 537, 550, 544 S.E.2d 290, 297 (2001) ("[E]ven assuming arguendo this stop was reasonable, certainly a twenty minute detention while the officers 'went fishing' for evidence of some crime was not brief within the definition of [listing various cases]"). *Cf. United States v. Sullivan*, 138 F.3d 126, 133 (4th Cir. 1998) (finding no issue when the officer did not ask the defendant questions until after he had returned his license and registration, thus ending the traffic stop and affording Sullivan the right to depart.); *accord Milledge v. State*, 422 S.C. 366, 379, 811 S.E.2d 796, 803 (2018) ("[T]he deputies did not detain Milledge for an excessive period in an attempt to question him and possibly gain probable cause to search his vehicle for contraband."); *Hill*, 852 F.3d at 384 (holding a dog sniff did not unreasonably extend the stop because the arrival of the drug dog was "contemporaneous with the diligent pursuit of the mission of the stop", but the Court added that it might have reached the opposite conclusion had the officer executed the stop in a

"deliberately slow or inefficient manner, in order to expand a criminal investigation within the temporal confines of the stop without reasonable suspicion of criminal activity or consent"). *See also Rodriguez,* at 1616 ("The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket...but whether conducting the sniff prolongs—i.e., adds time to —'the stop'").

Revelation of the true time of the traffic stop underscores the fishing expedition that it became through Owens's questioning. Owens testified that he concluded criminal activity was afoot after noticing the fast food bags, air freshener, receipts, and single cellphone on top of the console through the car windows on his second approach of the vehicle. According to Owens and Aman's testimony, only a few minutes passed between his second approach and the conclusion of the stop.[7] Subtracting the short duration of time from the second approach on from the total one hour and 10 minute length of the traffic stop reveals that a significant amount of time was spent on the unrelated questioning of Petitioner.

In light of the dilatory tactics used, it is significant that it was not until Owens's second approach that he had concluded that criminal activity was afoot "within the totality of the circumstances" App. p. 198, ln. 18-22. The absence of facts amounting to reasonable suspicion prior to the second approach further demonstrates that the nearly one hour-long extension of the stop through Owens's unrelated questioning constitutes as a fishing expedition for evidence of a

[7] Recall that Owens had taken the second approach in order to check on the VIN number where he observed these items and then returned to the patrol vehicle. App. p. 198, ln. 1-16; p. 201, ln. 1-4. Owens testified that he shortly thereafter received confirmation on Petitioner's documentation just as Aman pulled up to the scene. App. p. 201, ln. 4-11. Owens then finished writing the ticket, explained the ticket to Petitioner and handed his documents back. App. p. 201, ln. 4-11. Most importantly, Aman testified that after arriving to the scene, the stop only last a few minutes before Petitioner fled. App. p. 230, ln. 7-11.

crime.[8] Prior to Owens's second approach, Owens had observed only Petitioner's hands shaking and accelerated breathing, the lack of luggage in the vehicle, and the vehicle registration to a girlfriend of Petitioner rather than himself. Also prior to the second approach, Owens then only knew from Petitioner's responses to his questions that Petitioner was unemployed despite driving an expensive vehicle to fuel and staying at a Holiday Inn, and had been pulled over just prior to the exit for the Holiday Inn right off the interstate. App. p. 193-194, ln. 1-19. Addressing each of these circumstances in turn, they fail to culminate to amount to reasonable suspicion.

Although nervousness can exist among other factors arising to reasonable suspicion, Owens admitted that normally, some drivers appear nervous and have accelerated breathing. App. p. 191, ln. 6-9. Owens also belabored the point of Petitioner's nervousness and separated indicators of nervousness as if they each carried their own weight in the analysis. App. p. 190, ln. 9-10, 23-25; p. 191, ln. 1-15; p. 216, ln. 13-15. In *State v. Moore*, this Court expressed the "wear[iness] [of] the many creative ways law enforcement attempts to parlay the single element of nervousness into a myriad of factors supporting reasonable suspicion." 415 S.C. 245, 254-255, 781 S.E.2d 897, 902 (2016) (authorities cited omitted). "General nervousness will almost invariably be present in a traffic stop." *Id.* (also finding that the trial court properly declined to focus on nervousness). *See also Bowman*, 884 F.3d at 214 (holding nervousness "is of limited value to reasonable suspicion analyses.") (quoted authorities omitted) (internal quotation marks omitted). Owens stated he observed nervousness from Petitioner when handing over his drivers

[8] Note that Petitioner asserts reasonable suspicion did not exist at any time during the stop; Petitioner's focus on the duration of the stop prior to Owens's second approach is due to the lack of reasonable suspicion for the entire stop having been raised at the suppression hearing and on appeal. Petitioner nonetheless respectfully urges this Court to revisit the issue beyond this narrower context.

license and registration, yet Owens testified Petitioner exhibited no hesitation in complying with Owens's request for the items. App. p. 211, ln. 9-17.

Next, there is generally some logic to Owens's suspicion about third-party vehicle registration. Owens testified third-party registration is commonly used in drug trafficking to create a separation between the vehicle and the driver. However, Owens's had no information as to why Petitioner may be driving his girlfriend's vehicle, and this general theory carries little weight when considering no separation can be created between a driver and the registered owner when they are admittedly in a romantic relationship. As to the lack of luggage in the vehicle for a two-day visit, Owens could not view all areas and compartments of the vehicle that could hold luggage at that point and Petitioner had stated the trip had been "a spur of the moment thing." App. p. 195, ln. 4.

Owens also testified that Petitioner's lack of employment was "another clue or indicator in the business of drug trafficking", explaining:

> This is a Wednesday evening roughly at 10:10 p.m. The gentleman does not work but he is driving a nice large SUV that takes, requires a lot of gas to drive. Also, he is staying in a motel but he doesn't work. It makes you question what kind of living he is doing to pay for the expenses he is entailing. That was another indicator.

App. p. 194, ln. 4-12. The factor of unemployment has been viewed with a particularly skeptical lens by some courts. In *Bowman*, the Fourth Circuit assigned very little weight to the defendant's unemployment in a case very factually similar to Petitioner's because the officer could not point to any connection between the defendant's unemployment and criminal activity. 884 F.3d at 218. Without more, the Court found the factor of unemployment too "totally innocuous" because of the countless possibilities that could account for the defendant's possessions or vacation: "[T]emporary unemployment does not mean that vacations are financially unattainable.

[Defendant] may have saved money for the trip; he may have been the donee of a wealthy relative or acquaintance; he might have won the lottery or not yet exceeded the credit line on his VISA card." *Id.* (quoting authority omitted). Here, Owens had no other information on Petitioner's financial situation otherwise and did not inquire as to how Petitioner paid for the hotel and gas or who did and why. Owens did not inquire further on these considerations even though he would narrow each question based upon Petitioner's answer to a previous one. App. p. 195, ln. 10-21. Regardless, there was no connection between Petitioner's unemployment and criminal activity and without such connection, it is innocuous and carries little weight.

Owens's suspicion about observing Petitioner's driving at a location prior to an exit for a Holiday Inn near the interstate establishes an equally tenuous connection to criminal activity. Owens admitted he did not know which of the Holiday Inns in the area Petitioner had stayed and Petitioner, whom is not from the area, was unsure as well. App. p. 193, ln. 13-24. Although Owens added Petitioner really might not have known exactly where in the Greenville area he had been, Owens testified he nonetheless believed that Petitioner "was giving [him] clues that he was deceptive in his answer or wasn't being completely truthful." App. p. 193, ln. 18-24.[9] Although "false statements can be considered in establishing reasonable suspicion, a false statement, without more, will typically be insufficient." *Bowman* at 216 (internal punctuation and citations omitted) (quoting authority omitted). Similar to Owens's observations, the officer in *Bowman* believed the defendant had been untruthful about how long he had been traveling; the Court found it of little weight however because "[t]he government neither apprised us of what, if any,

[9] Owens also stated Petitioner used delaying tactics during this point in the conversation but added: "I don't know what those were right now. I just put in parentheses that there were delaying tactics noted." App. p. 194, ln. 15-19. *See Bowman* at 215. (explaining that if an officer cannot sufficiently articulate why some behavior is suggestive of criminal behavior other than to label it "suspicious" then it is not particularly probative).

significance such a falsehood normally has in the illicit drug trade, nor what inferences [the officer] drew from his belief that Bowman had not been truthful about how long he had been traveling." (internal punctuation omitted) (quoting authority omitted). Here, similar to *Bowman*, if there was any falsehood in Petitioner's statements about which hotel he stayed at during his visit, it does not sufficiently indicate criminal activity and no connection was otherwise established to some crime.

Each of the aforementioned factors identified by Owens have little if any basis to sufficiently suggest criminal activity. *See Id.* at 215 (explaining that if an officer cannot sufficiently articulate why some behavior is suggestive of criminal behavior other than to label it "suspicious" then it is not particularly probative). Viewed together, they also fail to amount to support reasonable suspicion and are no more than a hunch. *Id.* at 219 ("[I]t is 'impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such interpretation.'"). Not only does the conglomeration of the these factors fail to eliminate many innocent drivers, but Petitioner's responses to Owens's other questions weigh against Owens's reasonable suspicion. There was never hesitation from Petitioner in complying with Owens's request for his drivers license, registration, or to exit his vehicle. App. p. 211, ln. 9-17. Owens knew of no information, including negative information such as prior criminal history, about Petitioner. App. p. 211, 18-21. The stop was for minor traffic infractions. Owens did not report any odor or paraphernalia associated with narcotics coming from or within the vehicle, or any behavior associated with narcotic use from Petitioner. Petitioner did not have any drugs or weapons on his person. Petitioner told Owens he did not have a criminal record, had just graduated from a technical program, had not been drinking, and that there were no drugs or weapons in the vehicle.

The absence of facts giving rise to reasonable suspicion demonstrated above underscores that the stop was prolonged so that Owens could fish for evidence of some crime. Also indicative of this is Owens's careful check of the VIN number, the very purpose stated for making the second approach to ensure the vehicle was not stolen. Yet no circumstances were present to suggest the vehicle may have been stolen other than the third-party registration. Third party vehicle registration suggests relatively little for auto theft in this way because it was registered to Petitioner's girlfriend.

Because Owens questioned Petitioner from the time he began to write the citation, the time Owens spent to finish writing the warning citation is indicative of dilatory tactics in order to look for evidence as well. Owens testified after asking for Petitioner to step out of his car and to the rear of the patrol car was "when I was going to issue him a warning a citation for the moving infraction." App. p. 191, ln. 19-22. Owens patted him down for weapons and then he began to write the warning citation. App. p. 192, ln. 14-21. However, Owens did not finish writing the citation until much later, by nearly an hour, when Aman pulled up to their location. App. p. 201, ln. 4-11.

Additionally, the radio logs' reveal of the timing of Owens's observations on his second approach and the dilatory tactics employed brings this case closer to *State v. Tindall*, 388 S.C. 518, 698 S.E.2d 203 (2010).[10] In *Tindall*, one of the circumstances given to support reasonable suspicion — the defendant's statement that he was being paid $1,500 to drive a car from Atlanta to Durham — was elicited once the stop had already been extended when the officer had previously stated his intent to issue a warning ticket but chose not to, and instead opted to

[10] Several other factors identified by Owens as giving rise to reasonable suspicion were also identified by the officer in *Tindall*, such as nervousness, third party registration, and the defendant's short trip. *Id.* at 523, 98 S.E.2d at 206.

continue his questioning. 388 S.C. 518, 522, S.E.2d 203, 204 (2010). Because these precise travel itinerary details were unknown to the officer at the time the initial purpose for the stop was to conclude, the details therefore could not have been part of the reasonable suspicion calculus in extending the stop. Similar to *Tindall*, many of the items giving rise to Owens's purported reasonable suspicion were unknown to him until after he had already measurably and unreasonably prolonged the stop by approximately one hour. Owens's own testimony is particularly instructive on this point. Trial Counsel had asked Owens on cross-examination whether the nervousness, the third-party registration, and other identified factors amounted to reasonable suspicion to detain him further or would Owens have let Petitioner go if that was all he had observed at that point. App. p. 223, ln. 3-25. Owens stated he would had let Petitioner go without detaining him further if that was all the evidence he had apart from the third-party registration. App. p. 223, ln. 3-25; p. 224, ln. 1-9. The third-party registration made it "questionable" for Owens but only because it depended upon what answers he could elicit from Petitioner thereafter. App. p. 223, ln. 3-25; p. 224, ln. 1-9. It was only upon seeing the items in the vehicle on his second approach that Owens had concluded the circumstances amounted to reasonable suspicion and he would not had let Petitioner go after his second approach. App. p. 222; p. 223, ln. 1-2.

The prejudice resulting from Trial Counsel's error also has a rippling effect on the issue of Petitioner's consent to search. As revealed by the radio logs, the dilatory tactics and unreasonable and measurable extension of the traffic stop rendered Petitioner's consent to search fruit of the poisonous tree. *See State v. Copeland*, 321 S.C. 318, 323, 468 S.E.2d 620 (1996) ("The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been

obtained by the exploitation of that illegality."); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963) (holding the exclusionary rule applies not only to the direct product of police misconduct (the "primary" illegality), but also to secondary evidence, the "fruit of the poisonous tree"). *See also generally, State v. Pichardo,* 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005) ("Roadside consent searches are instead more akin to an investigatory stop that does involve a detention. A traffic stop, or pre-existing seizure, enhances the coercive nature of the situation and the efficacy of the other factors in pointing toward the restriction of liberty.") (internal citations omitted) (first citing *State v. Williams*, 351, S.C. 591, 600-01, 571 S.E.2d 703, 708 (Ct. App. 2002); then citing *Ferris v. State*, 355 Md. 356, 735 A.2d 491 (1999)).

As conceded by the State at the suppression hearing, it was not a consensual encounter. App. p. 251, ln. 9-10. The over hour long detention of Petitioner on the side of the highway expresses a greater coercive atmosphere than the ten (10) minute stop previously considered. Further, the revelation in the radio logs that the stop lasted over an hour aligns this case more with *Pichardo* than it had under the inaccurate evidence as to duration and time of the stop. In *Pichardo*, this Court affirmed the trial court's order suppressing drugs from an illegal search and seizure after the officer had returned the documents to the driver and said goodbye to the driver and passenger, whom was also the owner of the vehicle, before turning right back around and asking for permission to search. *Id.* at 102-105, 623 S.E.2d at 850-853. Just as in *Pichardo*, Petitioner was not told at any time that he was free to leave, although not a requirement of officers to do so, and had also been directed to step out of the car and move to another a location before having his person searched. *See Id.* at 102-103, 623 S.E.2d at 850 ("At this point, the 'encounter began to assume the tenor of an investigation.'"). (quoting *Williams,* 351 S.C. at 602, 571 S.E. 2d at 709). Like *Pichardo*, the tone of the encounter turned investigatory, questions by

Owens had prompted responses from Petitioner that no drugs or guns were in the car, and that he had never been in trouble in his life. Also similar to *Pichardo*, Owens asked Petitioner for consent to search shortly after another officer had arrived on scene. *See Id.* at 93, 623 S.E.2d at 845. It is not of fatal consequence that the aforementioned similarities occurred at different points of the stop. Both in *Pichardo* and in this case, the officers asked for consent to search after dilatory tactics were used and their documentation had already been returned. *See Id.* at 101, 623 S.E.2d at 849. Similar to *Pichardo,* Owens's unreasonable delay in calling dispatch for checks on Petitioner's documentation had "prolong[ed] the initial stop beyond its proper scope, render[ing] the ensuing encounter more coercive than consensual." *Id.* at 103, 623 S.E.2d at 850. Although "a law enforcement officer may request permission to search at any time", "when an officer asks permission to search *after* an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention." *Id.* at 105, 623 S.E.2d at 851 (italics in original) (citing *State v. Robinson*, 306 S.C. 399, 412 S.E.2d 411 (1991); *Williams,* 351 S.C. 591, 571 S.E.2d 703; *Wong Sun*, 371 U.S. at 487-488)). "Proof of a voluntary consent alone is not sufficient." *Id.* (citing *Williams*, 351 S.C. at 604, 571 S.E.2d at 710). Hence, the State in this case would have been required to make a higher showing to prove the voluntariness of consent had the evidence from the radio logs been used to show the prolonged stop and dilatory tactics by Owens because it was unlawful seizure. *See Provet*, 405 S.C. at 115, 747 S.E.2d at 460 (distinguishing *Provet* from *Pichardo* on this issue). The factors relevant to this determination include "the temporal proximity of the illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct." *Pichardo,* at 105, 623 S.E.2d at 851 (citing *Williams*, 351 S.C. at 604, 571 S.E.2d at 710; *Brown v. State*, 188 Ga. App 184, 372 S.E.2d 514, 516 (1988)).

In light of the prolonged stop and dilatory tactics, Petitioner's consent was not voluntary and was an exploitation of the unlawful traffic stop. Petitioner had been on the side of the Interstate answering Owens's questions for close to an hour when he was asked for consent to search.[11] Owens asked for consent standing next to Aman very close to Petitioner, with all three men standing within the area of the open patrol car door. The blue lights were also on when Petitioner was asked for consent. App. p. 201, ln. 25; p. 202, ln. 1. There was very little time between the unlawful detention and the consent to search, as Owens's described asking for consent to search immediately after returning his documentation. Specifically describing the sequence as the return of Petitioner's documents then — "slam bam"— Owens asks permission to search. Consequently, no intervening event occurred between the unlawful detention and asking for permission to search. The unjustified hour of time that passed from when Owens pulled Petitioner over and called in for a check on his documentation and the consequent opportunity to fish for evidence of a crime rise to the level of misconduct required for this determination. *See Id.* at 106-108, 623 S.E.2d at 851-853. The convenient timing of Owens issuing the citations and returning Petitioner's documentation simultaneous to or immediately after the drug dog's arrival, is also probative. Further, any legal basis for the officer's conduct here is severely diminished when considering the dilatory tactics employed. Thus, in light of the evidence revealed by the radio logs, Petitioner's consent was invalid because it was not voluntary and an exploitation of an illegal traffic stop. But for Trial Counsel's error in failing to investigate the length of the stop and obtain the radio logs, there is a reasonable probability the outcome of the suppression hearing would have been different.

[11] Similar to the officer turning back around and asking to search after saying goodbye in *Pichardo*, in this case, there was no "distinct ending point to the encounter to both the officers charged with enforcing the law and the citizens whom they encounter." *See Id.* at 104, 623 S.E.2d 850-851 (citations omitted).

The prejudice determination also involves evaluating the impact of Trial Counsel's error in light of the State's evidence and whether the evidence gleaned from the radio logs was not merely cumulative to other evidence presented. *See Sikes*, 323 at 32, 448 S.E.2d at 563. This Court has consistently held that where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward. *See Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998); *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). In this case, the video of the stop and the officers' testimony were of course pivotal to the State in defeating Petitioner's suppression motion and proving the charges beyond a reasonable doubt. The entire suppression hearing and trial operated on the premise that the traffic stop lasted only ten (10) minutes, with mere minutes separating Owens pulling Petitioner over and calling in for the drug dog and for a check on his documentation. Even Trial Counsel characterized the ten (10) minutes stop as "a normal period of time" when arguing to suppress the drug evidence. App. p. 248, ln. 17-18. No evidence of any kind was introduced to the contrary. Further, apart from the narcotics seized, no other evidence existed for the State to prove drug trafficking beyond a reasonable doubt. *See Sikes*, 323 at 32, 448 S.E.2d at 563 (finding prejudice from trial counsel's failure to move to suppress cocaine seized during a traffic stop "because the unlawfully-obtained evidence was the only evidence of Sikes' possession of cocaine"); *Bagwell,* 410 S.C. at 267, 763 S.E.2d at 634 (holding trial counsel's decision not to seek DNA testing prior to trial was unreasonable because the item that should have been tested was the State's best or only seemingly credible evidence to place the defendant at the crime scene, and the evidence was known and reasonably available to trial counsel prior to trial); *McKnight,* 378 S.C. at 54-55, 661 S.E.2d at 365. At the PCR Hearing, Trial Counsel also testified that evidence showing the actual length of the stop to be over an hour

long would have likely made a difference to the ruling on the suppression motion. *See Bagwell,* 410 S.C. at 266-267, 763 S.E.2d at 634 ("[P]rejudice may be found because trial counsel admitted the results of the DNA test 'may have affected' the outcome of Bagwell's trial"); *see also Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 471 (1998) (noting a court may find ineffective assistance of counsel based upon the failure to call a certain witness when trial counsel admitted the testimony of a witness might have made the difference in obtaining an acquittal).

Lastly, the PCR Court imprudently dismissed the probative value of the radio logs when evaluating the merits of this allegation. The PCR Court appears to draw on the principles contained in Rule 602 and Rule 701[12] when reasoning that it could not find Trial Counsel ineffective because Petitioner and Skidmore could not interpret the radio logs because neither had ever been employed with the Department of Public Safety nor wrote the radio logs themselves. However, the PCR Court's refusal to consider either testimony is baseless and an error of law. Rule 602 and provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 602, SCRE. Rule 701 provides that a lay witness may testify "in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training." Rule 701, SCRE. In regards to Petitioner, lack of personal knowledge is no issue.

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[12] As previously stated, the radio logs were properly authenticated and Respondent and the PCR Court took no issue with their authentication. App. p. 43, ln. 13-22; pp. 19-20.

Petitioner was there on the scene during the stop, had watched the video of the stop, and reviewed the records. *See generally e.g., State v. Wright*, No. 2011–UP–363, 2011 WL11735007 at *1, fn. 1 (Ct. App. June 30, 2011). Petitioner also identified the drivers license number in radio logs as his drivers license number, and pointed out to the PCR Court that his arrest warrants verified it was indeed his driver license number. App. p. 104, ln. 12-22. Further, the PCR Court had the entire lower court record for its consideration of his PCR, which was explicitly acknowledged during the hearing. App. 110, ln. 1-3. The PCR Court not only had Owens's trial testimony explaining the meaning of the codes used in the radio logs, but this portion of his testimony was also discussed during the hearing. App. p. 79, ln. 3-9; p. 95, ln. 24-25, p. 96, ln. 1-4. The PCR Court also had the video of the stop to aid its decision-making. App. 110, ln. 1-3. In addition to the radio logs themselves, the PCR Court also had Department of Public Safety material deciphering the codes used in the radio logs at the bench throughout the hearing as an additional aid to follow along and understand the radio logs and the testimony. App. p. 75, ln. 1-4. In light of Owens's trial testimony, Petitioner's PCR hearing testimony, and the material introduced at the PCR hearing, the PCR Court had all materials necessary to interpret the radio logs and consider the merits of this ground. In regard to Skidmore, he reviewed the records and video. *See generally, Saj v. Saj,* No. 2015–UP–571, 2015 WL 9393948 at *1 (Ct. App. Dec. 23, 2015) ("The GAL testified she reviewed Mother's medical records with Mother and Mother's attorney; thus, she had personal knowledge of the records."). His testimony provided information relating to what the radio logs contained, his obtainment of the copy of the video and radio logs presented to the PCR Court, as well as information regarding the unavailability of the original of the video. Yet even if Skidmore's past experience working in cases with the Departments' records were to be discounted, it would not foreclose review of this issue on the merits or relief

because the PCR Court had all necessary materials as well as Petitioner and Owens's testimony, which were based upon their personal knowledge.

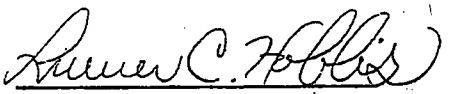
CONCLUSION

For the foregoing reasons, the Petitioner respectfully urges this Honorable Court to grant certiorari, reverse the PCR Court's order and remand for a new trial.

Respectfully submitted,

WILLIAM G. YARBOROUGH III

LAUREN C. HOBBIS

By: 

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COUNSEL FOR PETITIONER

August 23, 2018
Greenville SC

PROOF OF SERVICE

In addition to mailing the petition for writ of certiorari and appendix for filing to the Honorable Daniel Shearouse, Clerk of Court for the South Carolina Supreme Court, the undersigned hereby certifies that one (1) copy of the petition and appendix was served upon Respondent by U.S. mail, sufficient postage attached, addressed to Counsel for Respondent:

Assistant Attorney General DeShawn Mitchell
South Carolina Attorney General
P.O. Box 11549
Columbia, South Carolina 29211.

The undersigned further certifies that all parties required to be served pursuant to the South Carolina appellate court rules have been served.

This 23rd day of August, 2018.

Sandy Ignacio
Administrative Assistant
William G. Yarborough III, LLC

Sworn to before me this 23rd
day of August, 2018

Notary Public for South Carolina

My commission expires: 02.14.2028

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